

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

BASF AGRO B.V., ARNHEM (NL),
WÄDENSWIL BRANCH, BAYER S.A.S.,
and MERIAL LIMITED,

Plaintiffs,

v.

CHEMINOVA, INC.,

Defendant.

Civ. Action No. 10-CV-274

**MOTION TO STRIKE A PORTION OF
THE EXPERT REPORT AND THE
ENTIRE “SUPPLEMENTAL”
EXPERT REPORT OF JEFFREY
WINKLER AND PRECLUDE
TESTIMONY AND EVIDENCE**

Defendant Cheminova, Inc. (hereinafter “Cheminova”) hereby moves the Court to strike a portion of the expert report of Jeffery Winkler, Ph.D. and his entire “supplemental” report, including the use of that report in the upcoming *Markman* proceedings, as well as to preclude his anticipated testimony and evidence on those excluded topics.

In support of its motion, Cheminova relies upon the accompanying Brief in Support of its Motion, along with the accompanying declaration of Steven L. D’Alessandro and all exhibits annexed thereto.

Briefly, on April 6, 2011, Plaintiffs BASF Agro B.V., Arnhem (NL), Wädenswil Branch, Bayer S.A.S. and Merial Limited (collectively, “Plaintiffs”) tendered the expert burden report of Dr. Winkler pursuant to Federal Rule of Civil Procedure 26(a)(2). However, for the reasons discussed more fully in Cheminova’s accompanying Brief, at

least a portion of that report was deficient as a matter of law under the doctrine of *ipse dixit*, and should be stricken. Months later, after receipt and consideration of the reports, declarations and depositions of all of Cheminova's expert witnesses, Plaintiffs' offered Dr. Winkler's "supplemental" report. This new report discloses new opinions for the first time, and without justification for that late service. Further exacerbating the matter, Plaintiffs chose not to provide the report to Cheminova until, literally, the commencement of Dr. Winkler's deposition and at the end of expert discovery. For at least these reasons, Cheminova respectfully requests that Dr. Winkler's "supplemental" report be stricken in its entirety.

Furthermore, given the deficiency of the initial report and the dilatory disclosures that followed, Plaintiffs should "not [be] allowed to use that information or [Dr. Winkler] to supply evidence on a motion, at a hearing, or at a trial." Fed. R. Civ. P. 37(c)(1). Plaintiffs' apparent gamesmanship in conducting expert discovery in this case warrants severe sanction.

REQUEST FOR ORAL ARGUMENT

Cheminova respectfully requests oral argument on this motion.

Respectfully submitted this 17th day of June, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

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